

State of Colorado



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Governor

John Zakhem
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Meeting Minutes March 21, 2006

The State Personnel Board met in public session on Tuesday, March 21, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:15 a.m. Board Members Troy Eid, Don Mares, and John Zakhem were present in person. Board Member Elizabeth Salkind was present via teleconferencing. Board Member Diedra Garcia was absent.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were present in person.

I. REQUESTS FOR RESIDENCY WAIVERS

A. March 1, 2006 Report on Residency Waivers

Director Rozansky reported that there were no residency waiver requests this month.

II. PENDING MATTERS

A. Petition for Declaratory Order of the Colorado Federation of Public Employees (CFPE) v. Department of Personnel and Administration, State Personnel Board case number 2006D003.

Since Ms. Garcia was not present and Mr. Mares and Ms. Salkind were recused from participation in the consideration of this matter, there was no quorum for action, and the matter was tabled until the April Board meeting.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

- A. Jeckonias N. Muragara v. Department of Revenue, Division of Motor Vehicles, Driver Control Section, State Personnel Board case number 2006B001.

Mr. Eid moved to adopt the Order of Dismissal of the Administrative Law Judge. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Scott Horak v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2005G090.

Director Rozansky was recused from participation in the discussion of this matter. Board Counsel directed the discussion and answered questions for this case.

Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- B. Arthur Robinson v. Regents of the University of Colorado, University of Colorado at Denver & Health Science Center, College of Architecture and Planning, State Personnel Board case number 2005G008.

Board Counsel noted that pursuant to Board Rule 8-51B, Complainant's Request for Reconsideration may not be considered. Mr. Eid moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- C. Donna M. Joseph v. Department of Human Services, Division of Disability Determination Services, State Personnel Board case number 2005G093.

Board Counsel noted that pursuant to Board Rule 8-51B, Complainant's letter of clarification may not be considered. Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing on the grounds that, based on the information provided, Complainant did not establish that the appointing authority acted arbitrarily or capriciously or that there was a hostile work environment. In

addition, Complainant's claim of discrimination was beyond the scope of her grievance and, therefore, may not be considered. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

With regard to pleadings filed after the issuance of the Preliminary Recommendation of the Administrative Law Judge, upon the advice of Counsel, Mr. Mares moved to delegate to Director Rozansky the ability to address and rule upon such late filings. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- D. Susan Nickolette v. Department of Corrections, State Personnel Board case number 2005G097.

Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- E. Beverly Linden-Lowell v. Department of Transportation, State Personnel Board case number 2005G115.

Mr. Eid moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

- F. Eric Brunner v. Department of Corrections, State Personnel Board case number 2006G044.

Mr. Eid moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

There were no Initial Decisions or other final Orders of the Administrative Law Judges or the Director before the Board this month.

VI. REVIEW OF THE MINUTES FROM THE FEBRUARY 21 AND MARCH 1, 2006 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD

Mr. Zakhem moved to approve the minutes of the February 21, 2006 meeting as submitted. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Mares, Ms. Salkind, and Mr. Zakhem. Mr. Eid abstained because he was not present at that meeting.

Mr. Eid moved to approve the minutes of the March 1, 2006 meeting as submitted. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS FEBRUARY 21 AND MARCH 1, 2006 PUBLIC MEETINGS:

- A. Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, and Auraria Higher Education Center, State Personnel Board case number 2006D002.

Noting that a petition for writ of certiorari is pending in the Colorado Supreme Court, the Board voted to deny the petition for declaratory order based on jurisdictional grounds.

- B. Randy Pfaff v. Department of Corrections, State Personnel Board case number 2004B112(C).

The Board voted that: (1) Complainant's Withdrawal of Motion to Vacate Judgment Pursuant to C.R.C.P. 60(b) is granted; and (2) Attorney fees and costs are assessed against Complainant's counsel and awarded to Respondent for costs incurred in the preparation of Respondent's response to Complainant's Motion to Vacate, pursuant to C.R.C.P. 11 and 121, Section 1-15(8). The award of fees and costs is specifically assessed against counsel for Complainant and is not intended to be charged to or paid by Complainant in this case. The matter shall be remanded to the Administrative Law Judge for a hearing to determine the amount of attorney fees and costs.

- C. David Ruchman v. Department of Revenue, Enforcement Group, Hearings Division, State Personnel Board case number 2005B085.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision of the Administrative Law Judge an Order of the Board.

- D. Shelly Burke v. Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center, State Personnel Board case number 2004B069.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision of the Administrative Law Judge an Order of the Board.

- E. Helen Bruckbauer v. Department of Transportation, State Personnel Board case number 2004G056 (C).

The Board voted to deny Complainant's Pleading to the Director/Personnel Board for Reconsideration of the ALJ's Preliminary Recommendation of "Hearing Denied" Received February 13, 2006, pursuant to Board Rule 8-51B; to adopt the Preliminary Recommendation of the Administrative Law Judge; and to deny the petition for hearing.

- F. Ida Archuleta v. Department of Human Services, Colorado State Veterans Center, State Personnel Board case number 2005B048.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- G. Julie Torvik v. Department of Public Health and Environment, Laboratory Services Division, State Personnel Board case number 2005G040.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- H. Toni R. Lucci-Wolgamott v. Department of Natural Resources, Board of Land Commissioners, State Personnel Board case number 2005G044.

The Board voted to deny Respondent's Request for Materials to be included in State Personnel Board Packet, pursuant to Board Rule 8-51B; to adopt the Preliminary Recommendation of the Administrative Law Judge; and to grant the petition for hearing.

- I. Annette Collier v. Department of Human Services, Colorado State Veterans Home, State Personnel Board case number 2004B156.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- J. Chantal Smith v. Department of Human Services, Division of Child Welfare, State Personnel Board case number 2005G107.

The Board voted to deny Complainant's Motion to Reconsider Preliminary Recommendation of the ALJ, pursuant to Board Rule 8-51B; to adopt the Preliminary Recommendation of the Administrative Law Judge; and to deny the petition for hearing.

- K. Anthony Tweneboah-Koduah v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2005G068.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- L. Ron Harthan v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2006G034.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- M. Erin M. Hutchinson v. Department of Human Services, Division of Youth Corrections, State Personnel Board case number 2006G036.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- N. Nanci Bravo v. Department of Human Services, Colorado State Mental Health Institute at Pueblo, State Personnel Board case number 2006G039.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to deny the petition for hearing.

- O. Kevin W. Cook v. Regents of the University of Colorado, University of Colorado at Boulder, Housing Facilities Services, State Personnel Board case number 2006G012.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and to grant the petition for hearing on the issue of retaliation.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- **Staff Activities**

Director Rozansky reported that Administrative Law Judge Hollyce Farrell attended a week-long mediation training conducted by Judy Mares-Dixon in Louisville; Administrative Law Judge Denise DeForest conducted training sessions at the National Certified Investigator Training (NCIT) in Hartford, Connecticut; and arrangements for the April 18, 2006 Board Meeting to be held at a Department of Transportation facility in Glenwood Springs, followed by a tour of Hanging Lakes Tunnel, have been made by Patrick Gomez of CDOT.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

Stacy L. Worthington, First Assistant Attorney General, Employment Law Section, addressed the Board, mentioning that one issue of concern, which has recently arisen, involves the preliminary recommendations in which the ALJ grants a hearing while stating that the Board is not authorized to grant certain relief to Complainant. However, Board Rule 8-50B(G) provides, "Complainant has the burden of demonstrating the existence of valid issues which merit a hearing by showing that there is an evidentiary and legal basis that would support a finding that the action was arbitrary, capricious, or contrary to rule or law, and that the relief requested by complainant is within the Board's statutory authority."

X. PROPOSED LEGISLATION AND/OR RULEMAKING

RULEMAKING

Pursuant to the Notice of Proposed Rulemaking issued on January 30, 2006, and published in the Colorado Register on February 10, 2006, the Board considered amendments to State Personnel Board Rules in order to change the citation to the Board Rules to eliminate confusion with Director's Procedures, to clarify the number of copies of briefs and motions to be filed with the Board, to eliminate confusion regarding designations of exhibits for Board hearings, and to comply with the State Employee Protection (Whistleblower) Act, as defined in statute. These rules are proposed for the general clarification for the public and efficient management of the Board.

Following Mr. Zakhem's introduction, the comment portion of the rulemaking hearing was commenced during which no comments or testimony were made, nor were any documents submitted for Board review. Mr. Zakhem closed the

comment portion of the rulemaking hearing. He noted that no written comments were received by the Board regarding the proposed rules. Mr. Mares moved to amend the Board's current rules and permanently adopt the following amended proposed rules, and the accompanying statement of basis and purpose:

CHAPTER	SUBJECT
8-25B	Deleting, in its entirety, the fourth sentence regarding extensions of time for the whistleblower investigations to comply with statute.
8-59B(H)	Changing the middle sentence to read, "Complainant's exhibits should be marked using letters, and Respondent's exhibits marked using numbers."
8-73B	Changing the last sentence to read, "An original and nine copies must be filed with the Board and a copy must also be served on the opposition."
8-74B	Changing the first sentence to read, "For any appeal to the Board, an original and nine copies of any motion (except extension of time) must be filed."
All Board Rules	Changing the citation for all Board rules to eliminate confusion with the Director's procedures, by eliminating the "B" designation after each Board Rule number and inserting, in front of each Board Rule number, the words "Board Rule."
Initial paragraph in each chapter	Rewording the last sentence in the initial paragraph of each chapter to read, "Board rules are identified by cites beginning with the words 'Board Rule.'"

The specific authority of the State Personnel Board to promulgate these rules is found at Article XII, sections 13 and 14 of the Colorado Constitution; the State Personnel System Act, section 24-50-101, *et seq.*, C.R.S.; section 24-50.5-101, *et seq.* C.R.S.; sections 24-4-103, 105 and 106, C.R.S.; and *CAPE v. Lamm*, 677 P.2d 1350 (Colo. 1984).

The purpose for adopting and revising these rules is:

- The record of the rule making proceeding demonstrates the need for the rules.
- The proper statutory authority exists for the rules.
- To the extent practicable, the rules are clearly and simply stated so that their meaning will be understood by any party required to comply with the rules.
- The rules do not conflict with other provisions of the law. The duplication or overlapping of the rules, if any, has been explained by the Board.

Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

XI. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the February 17, 2006 Executive Session

C. Other Business

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APPROVED THIS 16th DAY OF MAY, 2006.

John Zakhem, Chair

Troy Eid, Member

Donald J. Mares, Member

Elizabeth Salkind, Member